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Dear Mr Witthoef

Development Referrals Issues Paper – April 2021

The State Planning Commission (the Commission) is pleased to provide a submission in response to the South Australian Productivity Commission's (SAPC) Development Referrals Issues Paper (the issues paper).

It's noted that the SAPC have specifically requested feedback on the 'information requests' identified in the Issues Paper in the context of three referrals:

- environmental significance (referrals to the Environment Protection Authority)
- native vegetation (referrals to the Native Vegetation Council)
- transport routes and corridors (referrals to the Commissioner of Highways).

The Commission has responded to relevant questions in the issues paper regarding:

- how the Code provides clarity in relation to the role of referral bodies in the assessment process
- rationale for the shift to a predominately direction role for referral bodies
- how powers of direction may be used, including guidance on the imposition of conditions.

In relation to information request 2.1 (Relevant authorities in the referrals process), the various referrals identified in the Code now identify the purpose of the referral, so that the applicant, relevant authority and referral body will better understand the scope and purpose of the referral and role of the referral body.

In relation to the three referral bodies subject to this review, the following purpose is identified in the Code:

Referral Body	Purpose of Referral
Commissioner of Highways – Urban Transport Routes Overlay	To provide expert technical assessment and direction to the Relevant Authority on the safe and efficient operation and management of all roads relevant to the Commissioner of Highways as described in the Planning and Design Code.
Native Vegetation Council – Native Vegetation Overlay	To provide expert assessment and direction to the relevant authority on the potential impacts of development on native vegetation.
Environment Protection Authority – Part 9.1 – Activities of environmental significance	To provide expert technical assessment and direction to the relevant authority on the assessment of the potential harm from pollution and waste aspects arising from activities of environmental significance and other activities that have the potential to cause serious environmental harm.

In relation to information request 2.2 (Impacts of the state planning reforms on referrals), it is anticipated that a shift to a referral body's role of predominantly direction where matters of state interest are being assessed will streamline the agency's expertise to only those matters pertinent to the proposed development, and as limited by the identified purpose of the referral.

This shift is likely to reduce lengthy referral responses which raise matters that are irrelevant to assessment under the planning legislation, thereby removing additional work of a relevant authority in analysing and identifying relevant information in a referral response.

For the majority of referrals under the *Planning, Development and Infrastructure Act 2016*, the referral body will have the ability to direct conditions on the planning consent. It is acknowledged that a relevant authority will no longer have the ability to edit the condition to accord with established case law guiding which matters conditions may deal with. However, in order to assist referral bodies in drafting conditions, the Commission has published [Practice Direction 12 \(Conditions\) 2020](#) which identifies classes of conditions which are prohibited, such as conditions which:

- require further approval to enable the condition to be met
- require substantial variation by altering the fundamental nature of an application
- go beyond the scope of what is being approved
- are unduly onerous
- are vague or uncertain.

The Commission is also of the view that referral agencies should be aware that any direction (either to direct conditions or refusal) should relate to the planning assessment at that point in time, and should not seek to control the ongoing management or maintenance of land (which are best dealt with through other mechanisms, such as licenses and permits).

It's noted that if a relevant authority is directed by a prescribed body to impose a condition in respect of a development authorisation and the condition is the subject of an appeal, both the prescribed body and the relevant authority are respondents to the appeal. This process should ensure that referral bodies are cognisant of the implications if invalid or ultra vires conditions are imposed.

Please find attached further background information on how referrals have been transitioned into the new planning system via the State Planning Reforms.

The Commission and Department staff worked closely with agencies to reduce unnecessary referrals in the transition to the new system, but welcome further feedback from SAPC in relation to this matter.

The Commission and Attorney-General's Department will continue to work with SAPC to provide relevant information, data and statistics in relation to referrals to assist the review.

Thank you for the opportunity to respond to the Issues Paper. The Commission looks forward to providing further input into the Inquiry in the near future.

Yours sincerely



Helen Dyer
Chair

Att: Transitioning Referrals into the New Planning System via the State Planning Reforms #17014075

TRANSITIONING REFERRALS INTO THE NEW PLANNING SYSTEM VIA THE STATE PLANNING REFORMS

Through the recent State Planning Reforms there was a significant review of the existing statutory referral arrangements under the *Development Act, 1993* and *Development Regulations, 2008*. This was undertaken to determine which referrals should be carried into the new system, and if so, to identify any necessary amendments or updates to ensure they are responding to a genuine state interest.

The *Planning, Development and Infrastructure Act 2016* (the Act) and the *Planning, Development and Infrastructure (General) Regulations 2017* (the Regulations) provide the ability for referral bodies/agencies to be provided with powers of 'Direction' or 'Concurrence'. Where such powers are not provided to an agency, then its referral responses are advisory in nature.

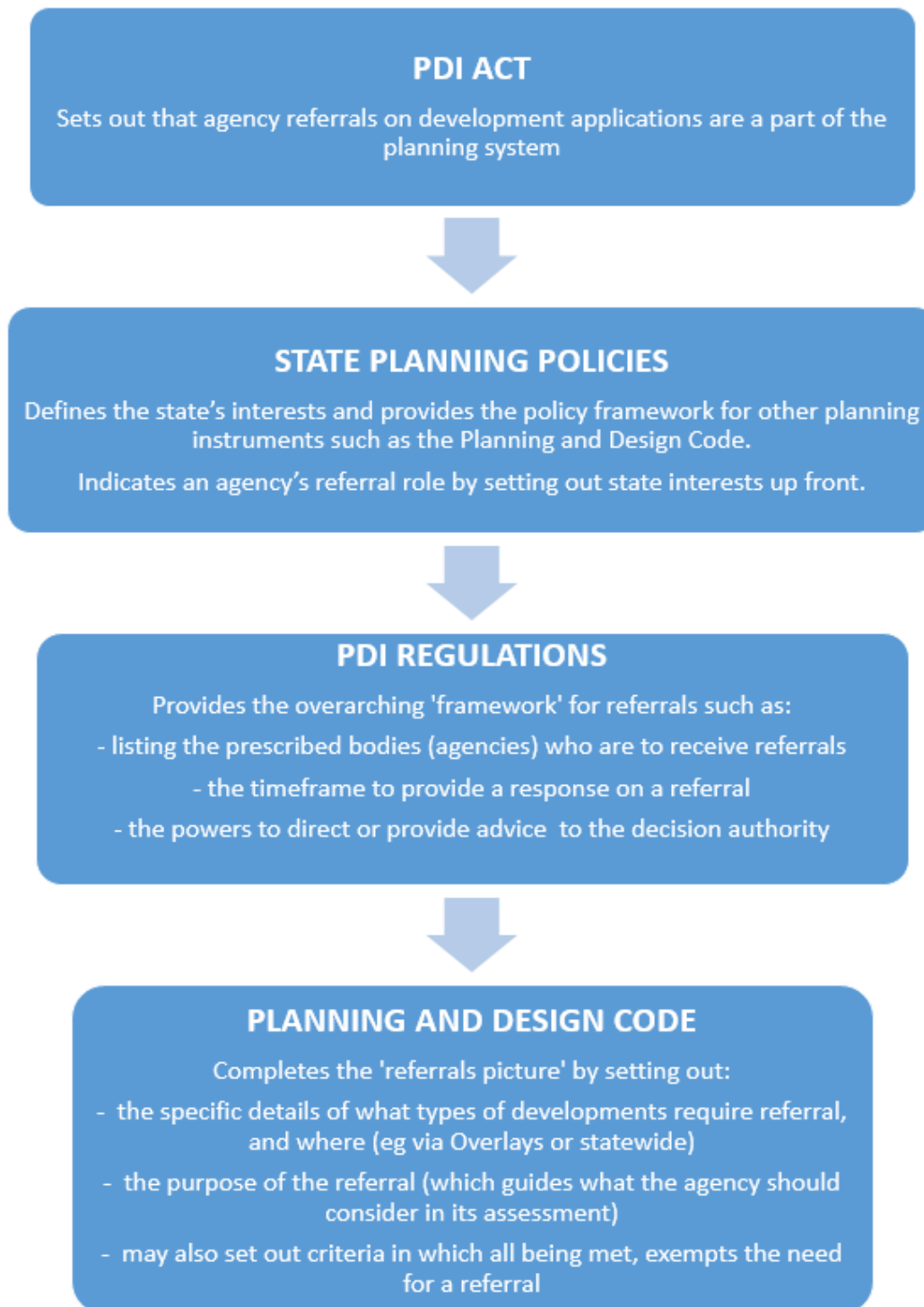
Referrals must be linked to policies within the Planning and Design Code (the Code), and have clear links to state interest set out in the State Planning Policies (SPP).

It is anticipated that referrals for direction under the Act will enable referral bodies to be more accountable for the responses made to a relevant authority as part of the planning assessment. It is for this reason that referrals for advice (regard) were generally not transitioned into the new planning system (with a couple of exceptions).

Agency referrals under the new planning system are also largely aligned to a head power under other legislation, with a connection to the planning system. For example, native vegetation clearance resulting from development on land where the *Native Vegetation Act 1991* applies.

The following flow chart sets out how referrals fit within various instruments in the new planning system.

FLOW CHART – HOW REFERRALS FIT WITHIN VARIOUS INSTRUMENTS IN THE NEW PLANNING SYSTEM



Some other key facts about referrals in the planning system include:

- All referrals are undertaken electronically via the PlanSA ePlanning solution. Development Application documents are not sent back and forth between councils and agencies, but rather digitally communicated online via the system functions.
- The Code is essentially a 'one stop shop' to obtain the information relating to the circumstances in which referrals are required, in lieu of the authorities needing to review development regulations under the old planning system for this purpose.
- Most referrals details are spatially represented by being located within Overlays in the Code to clarify the geographic locations where the referrals are required. The exception are certain referrals which are land use based (e.g. activities of environmental significance) set out in Part 9 of the Code.
- If an agency determines to request further information from an applicant during a referral process, it must request the information within the first 10 business days of receipt of the referral.
- For each referral in the Code there is a clear written 'purpose' which refines the scope of why the referral is being undertaken and in turn sets the scope for which the response from the relevant agency must focus on.
- The Act sets out that the Governor must be satisfied that provisions about the policy or policies that the referral body will seek to apply in connection with the referral are included in the Code (unless the Minister is satisfied that such a policy is not necessary or is not appropriate). The Governor was satisfied of this when prescribing referral bodies in the Regulations.
- If a referral agency directs that an application must be refused, the Act requires that the agency becomes a respondent to any appeal lodged in the Court by the applicant. The relevant authority can then decide to join as a third party in that appeal process.
- The fees for referrals were reviewed as part of the planning reforms and there are now different fees for different referrals such as licenced activities of environmental significance and native vegetation removal. The majority of agency referrals however still attract a set 'standard' fee.
- All agency referral responses are publicly available to view on the PlanSA website via the public register.
- Referral timeframes are now calculated in business days rather than calendar weeks. Typically 20 to 30 business days are allocated to referral agencies to respond depending on the nature of the referral.

Through the State Planning Reforms, the then Department of Planning, Transport and Infrastructure (DPTI), now the Attorney-General's Department (AGD), worked collaboratively with referral bodies/agencies, and received feedback from each outlining the preferred approach under the new system. As a result of these discussions, some referrals (or types of developments which currently trigger a referral) were removed due to being outdated or unnecessary.

The following table summarises the net result from the discussions with agencies on how referrals were transitioned into the new planning system.

Table 1: Summary of referrals under the old system vs under the new system

	OLD – Development Regulations 2008	NEW – PDI (General) Regulations 2017
Referrals for direction	20	22
Referrals for advice (regard)	8	3

Combination of direction/concurrence/regard depending on circumstance	4	0
TOTAL	32	25

**Note- the above figures represent each 'class of referral' and does not count the lists of individual development types or activities that specifically trigger a referral under each class.*